

# The Logan Act—Did We Wake Up a Criminal Act 200 Years Dormant?

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## I. INTRODUCTION

As recent developments involving communications with foreign nations come to the forefront of our country’s agenda, a rather old and forgotten Act has resurfaced, the Logan Act (the Act).<sup>1</sup> Certain actions by individuals within the new administration have caused many people, both in the political sphere and the media, to question the applicability of the Act. Though most Americans have never heard of the Act, breaking it is considered a federal offense that can result in not only heavy fines but also imprisonment.<sup>2</sup> The potential severity associated with the Act requires us to take a deeper look into the intricacies involved, as well as the reasons for its less than popular reputation.

## II. THE LOGAN ACT: WHY DO WE HAVE IT?

In near entirety, the Act states:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any

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1. Charlie Savage, *Logan Act: How Flynn’s Exit Revived Interest in a Dusty, Old Law*, N.Y. TIMES (Feb. 14, 2017), [https://www.nytimes.com/2017/02/14/us/politics/logan-act-flynn.html?\\_r=0](https://www.nytimes.com/2017/02/14/us/politics/logan-act-flynn.html?_r=0).

2. *Id.*

officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.<sup>3</sup>

Passed in 1799, the Act is a statute that makes it a felony for private citizens to interfere with diplomatic relations between the United States and foreign governments.<sup>4</sup> It essentially states that private individuals may not attempt to influence foreign policy without the permission of the U.S. government.<sup>5</sup>

The beginnings of this Act come during a time when America was fueled by political chaos and debate.<sup>6</sup> The reasoning behind the creation of the Act stems from disagreements between the Federalists and Democratic-Republican parties during the late 1790s.<sup>7</sup> Around the same time, France was at war with both England and Spain, leaving the United States to decide if and with whom they should side.<sup>8</sup> The United States' diplomatic norm was to avoid involvement and to remain neutral in European affairs, such as war.<sup>9</sup> Notwithstanding this general sentiment, France sent their newly appointed ambassador, Edward "Citizen Genet" Genet, to the United States in order to gain support for the French cause in their Revolution.<sup>10</sup> Despite the Federalist administration in office under George Washington and with tacit reassurance from Secretary of State Thomas Jefferson, Genet was able to encourage American citizens to invade Spanish territories in mainland United States, as well as recruit soldiers to fight for the French cause at English outposts.<sup>11</sup> Many Federalists at the time, especially Vice President John Adams, were appalled at the actions taken by Americans in their attempts to undermine the government's efforts at maintaining neutrality.<sup>12</sup> Citizen Genet continued inciting the American public in defiance of President

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3. 18 U.S.C. § 953 (1994).

4. *Id.*

5. Domenico Montanaro, *What Is the Logan Act, and Why Does It Matter?*, NAT'L PUB. RADIO (Feb. 14, 2017), <http://www.npr.org/2017/02/14/515279336/what-is-the-logan-act-and-why-does-it-matter>.

6. Josh Zeitz, *Iran, Tom Cotton and the Bizarre History of the Logan Act*, POLITICO (Mar. 12, 2015), <http://www.politico.com/magazine/story/2015/03/logan-act-tom-cotton-iran-116036?o=0>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

Washington's wishes in an effort to garner attention towards the French Revolution.<sup>13</sup>

While Genet's efforts ultimately ended in him pleading for asylum to President Washington, his actions furthered the divide regarding diplomatic and economic policy facing the United States during the late eighteenth century.<sup>14</sup> Federalists and Democratic-Republicans found themselves in opposing camps once the war broke out between France and England in 1793.<sup>15</sup> Initially neutral when the French Revolution began in 1789, England was eventually goaded to go to war with France after the French occupation of Dutch lands, a British ally.<sup>16</sup> Federalists, firm believers in the federal debt and tariffs, saw an alliance with Great Britain, fostered on foreign trade, as vital towards ensuring a sound central American government.<sup>17</sup> This resulted in Jay's Treaty, a widely unpopular means to maintain peace with England. Jay's Treaty focused on increasing trade between the two nations but did so without advancing many U.S. interests. Ultimately, the Act stabilized relations during a time of great uncertainty making it a necessary piece of legislation. Democratic-Republicans, on the other hand, fond of the similarities between the principles upon which the Revolution was grounded and the American independence movement, were in stark opposition to the monarchy in England.<sup>18</sup> With newly appointed President Adams now in office, controversial debates continued to take place.<sup>19</sup> Tensions rose between France and the United States as France made threats concerning American shipments containing British cargo eventually leading to the Quasi-War; in a negotiating move aimed at keeping peace, President Adams sent three envoys to Paris who were met by French negotiators that demanded the American government repudiate French debt and grant a "considerable loan" to the French.<sup>20</sup> This dishonesty and bribery by the French echoed within the American people infuriating both Federalists and an embarrassed Republican party.<sup>21</sup>

The actions of one individual became the focus of the Act now in question. George Logan, physicist and pacifist from Pennsylvania, took

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13. *Id.*

14. *Id.*

15. *Id.*

16. Rossith, *Britain in the Wars with France—1793-1815*, HISTORIA NERDICUS (Feb. 1, 2013), <https://historianerdicus.wordpress.com/2013/02/01/britain-in-the-wars-with-france-1793-1815/>.

17. Zeitz, *supra* note 6.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

it upon himself and traveled to France on a private trip in order to diffuse tensions between France and the United States.<sup>22</sup> Logan sailed to France in order to privately negotiate lifting an embargo and to have American sailors that were held captive in French prisons released.<sup>23</sup> The idea that Logan, a Democratic-Republican, in his attempt to take matters into his own hands, defied the Federalist administration caused an incredible amount of controversy.<sup>24</sup> At the time, the White House, Congress, and the Senate were under Federalist control which further exacerbated the gravity of Logan's actions.<sup>25</sup> Infuriated, Congress was quick to enact the Logan Act in addition to the Alien and Sedition Acts; the first of which, as mentioned, was aimed at curtailing individual interference with foreign policy, and the later series of Acts meant to make it easier for the U.S. government to deport and criminalize treacherous behavior.<sup>26</sup> One thing was clear, the Federalist framers wanted to establish that the authority to negotiate on behalf of the U.S. government was a power that was reserved exclusively for the executive branch.<sup>27</sup> Even though the Federalists were in firm control of both Congress and the White House, most Republican members of the Senate voted to enact the Logan Act as well, further showing a consensus agreement that Logan's actions exceeded his individual authority as a private citizen.<sup>28</sup> Ultimately, the Logan Act was born, along with its perplexing nature.

### III. THE LOGAN ACT: MENTIONS THROUGHOUT TIME

While retroactive application of the Logan Act to George Logan would be unconstitutional, the question remains as to why its application

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22. Charles C.W. Cooke, *The Logan Act Is Not a Friend to Liberalism*, NAT'L REV. (Mar. 13, 2015), <http://www.nationalreview.com/article/415397/logan-act-not-friend-liberalism-charles-c-w-cooke>.

23. Montanaro, *supra* note 5.

24. Clare Foran, *What Is the Logan Act and What Does It Have To Do with Flynn?*, ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/02/logan-act-michael-flynn-trump-russia/516774/>.

25. *Id.*

26. Cooke, *supra* note 22.

27. Zeitz, *supra* note 6. This notion was later captured in the Supreme Court case *United States v. Curtiss-Wright Export Corp.* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). There, the defendant Curtiss-Wright was charged with illegally sending arms of war to Bolivia in violation of an embargo on arms shipments placed by President Franklin Roosevelt. *Id.* at 312. The embargo was authorized pursuant to a joint resolution by Congress. *Id.* at 313. Though the defendants attempted to argue that Congress improperly delegated its legislative powers to the executive branch, the Court held that the President not only has vested powers when dealing with foreign affairs but also plenary powers that are not reliant upon congressional delegation. *Id.* at 312.

28. Zeitz, *supra* note 6.

has been inexistent since its creation. The Act is considered dead letter, as a study by the Congressional Research Service in 2015 indicated that nobody has ever been prosecuted under the statute and there are few instances of indictments under the law.<sup>29</sup> One such instance occurred in 1803 when a U.S. attorney was able to obtain from a grand jury in Kentucky an indictment against a Kentucky farmer who had written an article pledging support for creating a separate nation to the west of the United States that would be an ally to France.<sup>30</sup> The farmer, Francis Flournoy, placed an anonymous column in a local newspaper arguing for what he called “A Western America.”<sup>31</sup> In that instance, the prosecutor ended up dropping the case after the Louisiana Purchase expanded the United States westward and made the case moot, explaining why there is still a lack of prosecutorial history under the Act.<sup>32</sup> A second instance was apparently noted by a Federal Appeals Court law clerk, stating that a man was arrested in 1852 and indicted under the Logan Act for writing a letter to the president of Mexico.<sup>33</sup>

While there are limited cases directly discussing the Logan Act’s application to litigating parties, there are a number of court opinions that mention and interpret the Act’s meaning.<sup>34</sup> During the Civil War, Judge Sprague of the Circuit Court for the District of Massachusetts mentioned the Logan Act in two charges that he made to grand juries.<sup>35</sup> At the time the British Parliament had publicly stated that it had received a number of letters from Americans residing in Union States recognizing independence from the southern Confederate States.<sup>36</sup> In response, Judge Sprague declared that if such communication did in fact exist, it was considered a high misdemeanor, referencing the Logan Act’s purpose to prevent undesirable interference with U.S. foreign diplomacy and policy.<sup>37</sup> In his second grand jury charge, Judge Sprague again referenced the Logan Act when he stated that communication with foreign officers in order to counteract actions taken by the government “ha[s] been long prohibited by law.”<sup>38</sup>

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29. Savage, *supra* note 1. Dead letter means “a law that remains technically on the books but is essentially defunct or toothless.” *Id.*

30. *Id.*

31. Montanaro, *supra* note 5.

32. *Id.*

33. *Id.*

34. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT 1, 3 (2015).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

In a strongly worded opinion regarding a union member's alleged betrayal to the interests of the union during a negotiation between said union and a railroad company, the District Court of Maryland recognized the member's actions to be treacherous in a manner akin to George Logan himself.<sup>39</sup> The district court held that the competing sides, the union and the railroad, almost appeared to be different sovereignties, and for one member to side with the railroad company in an effort to prevent the union from moving forward with some of its arguments is no different than treason.<sup>40</sup> The district court reasoned that the traitorous actions by one individual caused the union to feel as Congress felt in 1799 when it enacted the Logan Act.<sup>41</sup> There are very few instances of courts discussing the Logan Act's constitutionality. The District Court for the District of Columbia, for example, analyzed the constitutionality of the Foreign Agents Registration Act of 1938 (Foreign Agents), purporting that although the Logan Act deals with citizen correspondence with foreign governments and the Foreign Agents Act deals with foreign principals' activities within the United States, both Acts are considered foreign affairs and, therefore, are "within the inherent regulatory power of the Congress."<sup>42</sup>

In one particular case, defendants attempted to assert that the plaintiff had obtained oil contracts with Iran while violating a series of criminal statutes, including the Logan Act.<sup>43</sup> The Southern District of New York stated that for that defense to hold up, the defendants would need to prove that the plaintiff's intention in making the oil contracts was to subvert a clear and unequivocal policy taken by the United States, rather than opinions or attitudes of government officials.<sup>44</sup> While the defendants were unable to show this intention by the plaintiff, the court actually proceeded to question the Act's constitutionality when held in the light of the Sixth Amendment.<sup>45</sup> Specifically, the court wrote that the statute's vague wording and usage of ambiguous terms like "defeat" and "measures" without giving any meaningful direction as to their purpose cast a negative light on the Act.<sup>46</sup> While the court ultimately did not find it necessary to decide the constitutionality of the Act, it indicated that the

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39. *Id.* at 4 (citing *Burke v. Monumental Div.*, 286 F. 949, 952 (D. Md. 1922)).

40. *Id.*

41. *Id.*

42. *Id.* (citing *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.D.C. 1951)).

43. *Id.* at 5-6 (citing *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D.N.Y. 1964)).

44. *Id.*

45. *Id.*

46. *Id.*

Act remains valid but called for congressional attention in order to amend the Logan Act with the aim of eliminating such ambiguity and confusion.<sup>47</sup> While there are additional cases that in dicta discuss the Logan Act, those holdings tend to merely mention the Act providing short excerpts about its meaning but do not expound into deeper discussions about its effectiveness or application.<sup>48</sup>

Comparing the landscape of America in the 1790s to the 2000s clearly reveals a tremendously different political agenda.<sup>49</sup> It has been many years since our country has been torn due to citizen alignment in support of other governments.<sup>50</sup> Since the country's politics of recent differ vastly from that in the late-eighteenth and nineteenth centuries, it is appropriate to understand the Act's application and purpose in modern times. Many believe that the Logan Act's modern day usage is more akin to attempts at political shaming of party opponents.<sup>51</sup> When disputes arise over foreign policy, party members have utilized the Act in order to denounce the opposition and accuse them of being not only wrong but also lawbreakers.<sup>52</sup> When checks and balances is on full display, it is fairly easy for one branch or party to condemn challengers and prevent them from encroaching further on their matters.<sup>53</sup> These condemned members are then cast in an unfortunate light as criminals.<sup>54</sup>

During President Ronald Reagan's presidency, the Democratic Speaker of the House, Jim Wright, attempted to help create a peace plan in Nicaragua when he reached out to then President Daniel Ortega Saavedra.<sup>55</sup> This incident occurred simultaneously with the Reagan administration's attempts to support the overthrowing of the Sandinista government.<sup>56</sup> While Reagan was aiding Nicaraguan Contras in their attempts to oust the Sandinista government, Wright and many other Democrats at the time aggressively fought back, including passing the Boland Amendments in the House (a series of amendments that

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47. *Id.*

48. *See generally* Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991); SEITZINGER, *supra* note 34, at 7.

49. *Zeitiz*, *supra* note 6.

50. *Id.*

51. Montanaro, *supra* note 5.

52. Savage, *supra* note 1.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

restricted government intervention in Nicaragua).<sup>57</sup> The restrictions placed on the government pushed officials within the National Security Council and the Central Intelligence Agency to organize covert operations to purchase weapons from Iran and give the proceeds to the Contras.<sup>58</sup> When news of the Iran-Contra scandal became known it put the Reagan administration in a defensive position, one that caused them to change course.<sup>59</sup> Timetables were put into place regarding when a peace agreement would need to be made between the Sandinista government and the Contras, but when the time came, no progress had been made.<sup>60</sup> It was at this point when Wright took initiative to meet with President Ortega after President Reagan refused a meeting with the Nicaraguan leader.<sup>61</sup> After the discussions took place, a cease-fire between the Sandinista government and the Contras was reached.<sup>62</sup> While on its face it seemed as if Wright's actions only benefitted Central America and Nicaragua in particular, many Republicans were outraged by Wright, and accusations of him violating the Logan Act erupted.<sup>63</sup> Arizona Senator John McCain was quoted saying, "I think it's at best unseemly . . . and at worst unconstitutional."<sup>64</sup>

Again, during Reagan's administration, there was another instance when the Logan Act was in the media spotlight.<sup>65</sup> President Reagan questioned the actions of Reverend Jesse Jackson, who was attempting to pursue a mission of personal diplomacy in order to seek the release of a certain Soviet physicist being held prisoner in Moscow.<sup>66</sup> This was not Reverend Jackson's first mission as he had previously gone to both Cuba and Nicaragua seeking the release of political prisoners in both nations.<sup>67</sup>

As the lead federal executive department in foreign affairs and principal adviser to the President, the Department of State (DOS) in its time has come across a pair of questionable instances involving the

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57. Julian Zelizer, *How Jim Wright Schooled Ronald Reagan on Diplomacy*, WASH. POST (May 7, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/05/07/how-jim-wright-schooled-ronald-reagan-on-foreign-diplomacy/?utm\\_term=.8874d8f908d9](https://www.washingtonpost.com/posteverything/wp/2015/05/07/how-jim-wright-schooled-ronald-reagan-on-foreign-diplomacy/?utm_term=.8874d8f908d9).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Francis X. Clines, *Reagan Contends Jackson's Missions May Violate Law*, N.Y. TIMES (July 5, 1984), <http://www.nytimes.com/1984/07/05/us/reagan-contends-jackson-s-missions-may-violate-law.html>.

66. *Id.*

67. *Id.*



Logan Act, one of more significant importance.<sup>68</sup> In 1975, two Senators, John Sparkman and George McGovern, traveled to Cuba and met with foreign officials to discuss diplomatic relations between the two countries.<sup>69</sup> In response, the DOS released a statement in which they claimed that nothing in the Logan Act appeared to restrict members of Congress from participating in discussions with foreign nationals if such participation in discussions was done in order to properly perform their legislative duties under the Constitution.<sup>70</sup> The Senators had informed the executive branch of their intentions before their trip, as well as received proper validation for their passports from the executive branch in order to travel to Cuba.<sup>71</sup> Different from aforementioned scenarios, the Senators specifically made a point, before discussing with Cuban officials, to indicate they had no negotiating authority for the United States.<sup>72</sup> Primarily because their actions were in pursuance of their proper legislative duties, the DOS acknowledged that they were protected by the second paragraph of Section 953 (Logan Act).<sup>73</sup> The second paragraph states, “This section shall not abridge the right of a citizen to apply himself, or his agent, to any foreign government, or the agents thereof, for redress of any injury which he may have sustained from such government or any of its agents or subjects.”<sup>74</sup> Since the discussion between the Senators and Cuban officials were not in opposition of American foreign policy and were personal in nature, it was not deemed to be a violation.<sup>75</sup>

Again, in March 2015, forty-seven Republican senators were accused of violating the Logan Act for writing a letter to the Iranian government warning them of President Obama’s limited time in office and that any nuclear arms agreement between Iran and the United Nation’s Security Council could be undone by the next President.<sup>76</sup> The letter clearly sent a message that whatever agreement was reached would be considered nothing more than an executive agreement between President Obama and Ayatollah Khomeini, rather than an approved act of Congress.<sup>77</sup> While those Senators were not afraid to admit their

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68. SEITZINGER, *supra* note 34, at 8-9.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 18 U.S.C. § 953 (1994).

75. SEITZINGER, *supra* note 34, at 9.

76. Jeremy Diamond, *Did 47 Republican Senators Break the Law in Plain Sight?*, CNN (Mar. 11, 2015), <http://www.cnn.com/2015/03/10/politics/tom-cotton-iran-letter-logan-act/>.

77. *Id.*

intentions were to prevent Iran from getting a nuclear deal, which clearly influences any ongoing negotiations between the Obama administration and Iran, nobody decided to move onwards to prosecuting the forty-seven senators.<sup>78</sup> Federal officials and even academics seemed confident that nothing would come of these actions, despite circulating petitions, relying on the Act's almost inexistent history.<sup>79</sup>

#### IV. THE LOGAN ACT: LT. FLYNN & RUSSIA

Despite the number of times accusations of Logan Act violations have been thrown around in years past, we have yet to see anything concrete come from those accusations. That very conundrum is why there are many who are skeptical about its usage in its most recent elicitation involving Lieutenant (Lt.) Michael T. Flynn.<sup>80</sup> Lt. Flynn had been appointed National Security Adviser by President Donald Trump, and his tenure lasted less than a month.<sup>81</sup> The main issue concerning the former U.S. Army Lieutenant General is regarding his contacts in late 2016 with the Russian ambassador to the United States, Sergey I. Kislyak.<sup>82</sup> From what the Federal Bureau of Intelligence (FBI) was able to discern from their investigation of his phone calls, Lt. Flynn and Kislyak spoke about those serving under the Obama administration at the time attempting to administer sanctions against the Russians for their alleged interference of the 2016 presidential election.<sup>83</sup> The alleged interference was that Russia had hacked into Democratic party emails and provided them to WikiLeaks, who then released them in an effort to aid Donald Trump, President-elect at the time.<sup>84</sup>

Initially, when news of the phone calls between Lt. Flynn and Kislyak became public in January 2017, the new White House Administration was adamant that the topic of those conversations was logistical rather than about possible sanctions.<sup>85</sup> Vice-President Mike Pence had directly spoken to Lt. Flynn and, based on information he was told, stated, "They did not discuss anything having to do with the United States' decision to expel diplomats or impose censure against

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78. *Id.*

79. *Id.*

80. Savage, *supra* note 1.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Eric Levenson, *Why Michael Flynn Likely Won't Face Charges Under the Logan Act*, CNN (Feb. 14, 2017), <http://www.cnn.com/2017/02/14/politics/michael-flynn-logan-act/>.

Russia . . . .”<sup>86</sup> After the FBI’s initial questioning, the Department of Justice (DOJ) took a deeper look into the allegations.<sup>87</sup> Upon further investigation, the DOJ heeded warnings to the Trump administration that Lt. Flynn had misled officials within the administration regarding the context of his communications.<sup>88</sup> One U.S. official was able to confirm that Lt. Flynn and Kislyak did, in fact, speak about the sanctions regarding Russia’s involvement in the 2016 presidential election.<sup>89</sup> This discussion of foreign policy between the two officials was a breach of protocol that caused DOJ officials to believe Lt. Flynn would be subject to blackmail from Russian parties due to his incomplete and dishonest recollection of the incident to Vice-President Pence and other White House officials.<sup>90</sup>

The application of the Logan Act to Lt. Flynn is considered to be murky at best.<sup>91</sup> While the facts of this situation trigger many of the perceived requirements under the Logan Act, further inspection into the details makes things more complicated.<sup>92</sup> First, there is no indication from any source showing that anybody within the Obama administration had given Lt. Flynn the authority to speak to any foreign officials regarding American foreign policy.<sup>93</sup> While Lt. Flynn was a member of Trump’s transition team, the President-elect is not protected under the Logan Act since he is not considered an official of the United States.<sup>94</sup> According to Harvard Law constitutional law professor Laurence Tribe, members of the new administration at that point are considered to be working in private-capacity since they have yet to take the oath.<sup>95</sup>

One of the complications regarding Lt. Flynn’s personal implications is his contribution to the conversation. According to both the FBI and other intelligence groups reviewing the phone call, it is unclear what exactly Lt. Flynn himself said to Mr. Kislyak.<sup>96</sup> There is nothing to suggest that Lt. Flynn actually said anything improper; in

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86. *Id.*

87. *Id.*

88. *Id.*

89. Kevin Liptak et al., *Trump Says He’s Unaware of Reports Flynn Discussed Sanctions with Russian Ambassador*, CNN (Feb. 11, 2017), <http://edition.cnn.com/2017/02/10/politics/flynn-russia-us-sanctions-reports/index.html>.

90. Maggie Haberman et al., *Michael Flynn Resigns as National Security Adviser*, CNN (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

91. Levenson, *supra* note 85.

92. *Id.*

93. *Id.*

94. Savage, *supra* note 1.

95. *Id.*

96. Liptak et al., *supra* note 89.

particular, there was nothing indicating that he made statements opposing Obama's proposed sanctions.<sup>97</sup> Rather, an aide close to Lt. Flynn stated that the National Security Advisor has "no recollection of discussing sanctions," but he "couldn't be certain that the topic never came up."<sup>98</sup> This controversy over Lt. Flynn's conversations is a large reason why the White House released statements saying they did not find any "legal issues," but, rather, the issues were of trust and politics.<sup>99</sup> These unanswered questions both in the history of the Logan Act's application and in Lt. Flynn's communications are a big reason why it is unlikely we see Lt. Flynn become the first ever to be prosecuted under the Act.<sup>100</sup> Despite not facing any immediate legal action, Lt. Flynn stepped down from his position on February 13, 2017.<sup>101</sup>

## V. CONSTITUTIONAL ANALYSIS

One of the biggest areas of concern regarding the Logan Act's modern day application is its encroachment onto freedom of speech, a freedom the courts look heavily to protect.<sup>102</sup> Professor Steve Vladeck of the University of Texas School of Law, in claiming that the Logan Act "is a relic of a bygone era," stated it essentially criminalizes speech, which the Supreme Court is very skeptical about intruding.<sup>103</sup> Professor Vladeck "proposed both that the act is 'unconstitutionally vague' and that it would be 'unlikely to survive the far stricter standards contemporary courts place on such content-based restrictions on speech.'"<sup>104</sup> As opposed to the Act's early history when partisan political opposition was more freely spoken publicly, we are in a time where it is almost unheard of for the U.S. government to become involved due to our First and Fifth Amendment jurisprudence.<sup>105</sup> Professor Vladeck went on to mention the term "desuetude"—the legal doctrine that posits that statutes, typically criminal ones, may lapse if they are never enforced.<sup>106</sup> He admits that desuetude may not be commonplace (it has even been previously

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97. *Id.*

98. *Id.*

99. Levenson, *supra* note 85.

100. *Id.*

101. Haberman et al., *supra* note 90.

102. Levenson, *supra* note 85.

103. *Id.*

104. Cooke, *supra* note 22.

105. Foran, *supra* note 24.

106. Eugene Volokh, *Did Speaker Boehner and the Republican Senators Violate the Logan Act?*, WASH. POST (Mar. 11, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/11/did-speaker-boehner-and-the-republican-senators-violate-the-logan-act/?utm\\_term=.e5760a013b5c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/11/did-speaker-boehner-and-the-republican-senators-violate-the-logan-act/?utm_term=.e5760a013b5c).

rebutted by courts specifically in reference to the Logan Act), but the facts surrounding the Logan Act make it a prime example of such a statute.<sup>107</sup>

Laws concerning facial regulation of content are considered presumptively unconstitutional under the First Amendment, unless the government can show the laws are narrowly tailored to serve a compelling government interest.<sup>108</sup> In regards to the Logan Act, it can be clearly argued that it is not narrowly tailored; rather, it applies to any alleged “controversy” without discussing what a controversy truly entails.<sup>109</sup> The law as it is written is very broadly sweeping and ambiguous on what it aims to enforce. One compelling argument against the Logan Act’s constitutionality is with the motive and intent of the Federalist Congress when they passed the Act in 1799.<sup>110</sup> As previously mentioned, that same Congress also passed the Sedition Act of 1798, which made it a crime to impede any act of government or prevent a government officer from performing his duty.<sup>111</sup> The Logan Act criminalized false statements and those that were too critical of the federal government, with an underlying purpose meant to curtail Republican newspaper editors.<sup>112</sup> The argument is that in today’s modern view, the Sedition Act of 1798 is a prime example of a law that violates the First Amendment right and guarantee of freedom of the press.<sup>113</sup> Given the context of the Sedition Act, the similarly posed Logan Act would surely fit squarely into the paradigm of a law that violates the First Amendment freedom of speech.<sup>114</sup> Based on our understanding of modern jurisprudence and that the Logan Act is a direct prohibition on speech, we must undertake the highest level of judicial review when analyzing the Act—strict scrutiny.<sup>115</sup> In order to pass the strict scrutiny analysis, the government would have to show that the Logan Act serves a compelling government interest and must achieve that goal using the

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107. *Id.*; SEITZINGER, *supra* note 34, at 6 (citing *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, at 89 n.30 (S.D.N.Y. 1964)).

108. Davis B. Rivkin Jr. & Lee A. Casey, *Flynn Should Not Be Tried Under the Logan Act: Column*, USA TODAY (Feb. 24, 2017), <http://www.usatoday.com/story/opinion/2017/02/24/flynn-russia-logan-act-treason-first-amendment-column/98320684/>.

109. *Id.*

110. Noah Feldman, *Logan Act Is Too Vague To Prosecute Flynn. Or Anyone.*, BLOOMBERG VIEW (Feb. 15, 2017), <https://www.bloomberg.com/view/articles/2017-02-15/logan-act-is-too-vague-to-prosecute-flynn-or-anyone>.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

least restrictive means possible.<sup>116</sup> What constitutes a compelling government interest in connection with the Logan Act has yet to be decided due to the lack of prosecution under the Act.<sup>117</sup> This lack of direction creates confusion as to the Logan Act's textual meaning.<sup>118</sup>

Another legal analyst and former constitutional law professor, Philip Holloway, also expanded upon the constitutional questions raised by the Logan Act.<sup>119</sup> In describing the Act's application to Lt. Flynn, Holloway cited two reasons why criminal prosecution would be unlikely.<sup>120</sup> First, it is in agreement by most people that the Act is unconstitutional because it violates the First Amendment and its protections of freedom of speech as well as freedom of association.<sup>121</sup> Secondly, the Act is unconstitutionally vague, as clarified by former Deputy Attorney Assistant General Tom Dupree Jr.: “[L]ike many federal criminal laws, this statute is drafted exceedingly broadly. Unlike other criminal laws, you don’t have a rich body of judicial precedent to narrow the scope of the law. All that said, I think a Logan Act prosecution would likely face serious constitutional difficulties.”<sup>122</sup> The modern vagueness doctrine discouraging the usage of criminal statutes that do not clearly indicate what exactly is prohibited as well as the infringements upon constitutionally protected rights make the Logan Act questionable at best as a fundamentally sound legal doctrine.<sup>123</sup> The slightest of threats of criminal sanctions (up to three years of prison time and fines) against American citizens’ rights is enough for the courts to mindfully avoid prosecution under the Act in fear of constitutional invalidity.<sup>124</sup>

## VI. PROPOSED REVISIONS

Many scholars agree that the Logan Act's inexistence over its 200-year life can be attributed to its poorly worded text and structure.<sup>125</sup> The law as written is considered “broadly sweeping” making it unclear to whom and for what exactly the statute should apply.<sup>126</sup> The vagueness in

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116. *Id.*

117. *Id.*

118. *Id.*

119. Veronica Stracqualursi, *Explaining the Logan Act that Dems Say Mike Flynn May Have Violated*, ABC NEWS (Feb. 15, 2017), <http://abcnews.go.com/Politics/explaining-logan-act-dems-mike-flynn-violated/story?id=45481930>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Levenson, *supra* note 85.

126. Foran, *supra* note 24.

a criminal statute, such as the Logan Act, would allow for extensive prosecutorial discretion that the Supreme Court has previously been known to strike down.<sup>127</sup> The Court has previously found, for instance, a Massachusetts statute that criminalized contemptuous public treatment of the American flag to be too vague.<sup>128</sup> The Court went on to state that an inherent problem with such vague laws is that “what is contemptuous to one man may be a work of art to another.”<sup>129</sup> Put in a more modern context, while communications with foreign governments may indeed be unauthorized and, therefore illegal, the same communications could be commonplace and second nature to another; without precise statutory instruction we are left blind to the true breadth of the law. In addition to the issues concerning the vagueness doctrine is the matter of scope. In its current form, the Act is entirely too broad, which may lead to potential invasions of protected freedoms, thus, illustrating the Act’s potential unconstitutional nature.<sup>130</sup> By means of both vagueness and undefined scope, the Act can lead to prejudicial and discriminating results contrary to the basic rights afforded to American citizens by the Constitution.<sup>131</sup>

For these very reasons, it is imperative that at the very least the Logan Act is amended, if not repealed in its entirety. The court in *Waldron v. British Petroleum Co.* casted doubt on the Logan Act’s constitutionality and strength due to the abstract terminology used, referring in particular to the words “defeat” and “measures.”<sup>132</sup> The Act’s language forbids, directly or indirectly, correspondence with foreign government, first, with the intent to influence measures or conduct of any foreign government related to either disputes or controversies with the United States or, second, in order to defeat measures of the United States.<sup>133</sup> How one is supposed to ascertain the meaning of the words “defeat” and “measure” without reliable sources clarifying the matter is untenable.<sup>134</sup>

In 2006, F. James Sensenbrenner, Chair of the House Judiciary Committee in the 109th Congress, proposed a revision to the Logan Act with a focus on limiting the legislation to prohibit only knowingly false

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127. Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 340 (1987).

128. *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

129. *Id.* (citing *Goguen*, 415 U.S. at 573).

130. *Id.* (citing *Goguen*, 415 U.S. at 573).

131. *Id.* at 297.

132. SEITZINGER, *supra* note 34, at 6 (citing *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964)).

133. 18 U.S.C. § 953 (1994).

134. Kearney, *supra* note 127, at 341-42.

statements made under oath.<sup>135</sup> That section, titled “False statements influencing foreign government,” was written as follows:

Whoever, in relation to any dispute or controversy between a foreign government and the United States, knowingly makes any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the United States or any department or agency thereof, to the injury of the United States, shall be imprisoned not more than ten years.<sup>136</sup>

This proposed revision attempted to limit the Act to those knowingly committing perjury in relation to communications with foreign governments, yet it still did not address the root cause of the issue, what conversation material was actually forbidden. This was not the first time the Act had come under scrutiny in Congress.<sup>137</sup> During the Ninety-fifth U.S. Congress, Senators Edward Kennedy and James Allen agreed to discuss the Act and whether it should be removed from the U.S. criminal code.<sup>138</sup> Unfortunately, the House was unable to consider the criminal reform bill during this session of Congress, thereby, eliminating the chance for the conference committee to discuss its validity and purpose.<sup>139</sup>

Based on the issues that judges, lawyers, and politicians have with the Logan Act’s ambiguity, it seems like one of the changes that should be considered is the inclusion of a narrow topic range that is forbidden during communication with foreign governments and officers. As we stand, nobody is certain of what topics are off limits, this breadth of possible violations “freezes” citizens which is why many believe this to be a clear violation of the First Amendment right to free speech.<sup>140</sup> Secondly, not only is the context of the communication unclear, but it is also up for interpretation what the conversation contravenes. If we do not know what types of communication are illegal, how are we realistically given freedom of speech, unless we are expected to accept the legal consequences. Will discussing foreign policy contentions between the U.S. government and a foreign government, with no intention of

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135. H.R. 6253, 109th Cong. § 954 (2006).

136. *Id.*

137. SEITZINGER, *supra* note 34, at 11.

138. *Id.*

139. *Id.*

140. Feldman, *supra* note 110.



conducting international relations, result in a felony sentence? This once again rehashes the vagueness doctrine; without clarity, it is unconstitutional to apply the Logan Act.

## VII. CONCLUSION

Thanks to recently occurring events involving private communications with foreign governments, in particular with the Russian government, the Logan Act was briefly awoken from its 200-year slumber.<sup>141</sup> While the Act threatens to impose criminal sanctions, the bite of the Act loses its potency upon closer examination into its history, or lack thereof, and the general disdain by both the academic and judicial community regarding it.<sup>142</sup> Over the course of its existence, the Act has been wielded as a political weapon in order to stifle political opponents in the field of foreign policy.<sup>143</sup> When an Act's primary usage is to denounce individuals and to stir controversy, it is time for us to reconsider not only the value of such an Act but also its constitutionality.<sup>144</sup> The Act's encroachment into First Amendment protections of free speech is a serious harm that will forever be problematic as long as our courts look to protect American citizens of the basic freedoms guaranteed by our Constitution.

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141. Levenson, *supra* note 85.

142. Stracqualursi, *supra* note 119.

143. Savage, *supra* note 1.

144. *Id.*